84-1555

No.____

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In The Supreme Court
OF THE
United States

OCTOBER TERM, 1984

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,
Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; WOODWARD SAND COMPANY, INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District of California

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. By requiring payments of "withdrawal liability" to a multiemployer pension trust from an employer who has no further contractual obligation to the pension trust, does the Multiemployer Pension Plan Amendments Act of 1980 [29 U.S.C. § 1381(a), *et seq.*] take the private property of the employer for the private use of the pension trust in violation of the Taking Clause of the Fifth Amendment of the Constitution?

2. If the property taken from the employer by § 1381(a) is for a public use, is the property taken without just compensation in violation of the Taking Clause of the Fifth Amendment?

3. If the provisions of § 1381(a) imposing withdrawal liability are void under the Taking Clause, are the provisions of 29 U.S.C. §§ 1306-1307 requiring payment of premiums from the appellant Pension Trust to the appellee agency invalid, either because inseparable from § 1381(a) or because the remaining statutory design would violate the Due Process Clause of the Fifth Amendment?

4. Is the appellant Pension Trust excused from paying "premiums" to PBGC under Title IV of ERISA as enacted in 1974 [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] either because the statute is so irrational with respect to multiemployer pension plans as to be a violation of the Due Process Clause of the Fifth Amendment, or because the statute violates the Separation of Powers principle of the Constitution by delegating legislative discretion to determine the use of funds collected?

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Appellants,

VS.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America; WOODWARD SAND COMPANY, INC.; PENFIELD & SMITH, INC.; KLEMA ENGINEERING, INC.; and MUNICIPAL ENGINEERS, INC.,
Appellees.

On Appeal From A Three Judge Court Of The United States District Court For The Central District of California

JURISDICTIONAL STATEMENT

John L. Connolly, et al.,[1] the appellants, appeal from the Judgment of the Three Judge Court convened in the

[1]All parties to the proceeding in the district court are listed as follows: John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H.

United States District Court for the Central District of California entered December 4, 1984, holding that certain federal statutes are constitutional and denying a permanent injunction against enforcement of such statutes.

OPINIONS BELOW.

The Order Granting Summary Judgment To Defendant filed by the Three Judge Court of the U.S. District Court for the Central District of California on May 1, 1984, appears in the appendix at page 1, and is not officially reported. The Order Granting Summary Judgment to plaintiffs filed by the district court on February 12, 1976, is reported at 419 F.Supp. 737 and appears in the appendix at page 42. The opinion of the U.S. Court of Appeals for the Ninth Circuit reversing summary judgment for plaintiffs and remanding is reported at 581 F.2d 729 (1978) and appears in the appendix at page 30. This Court denied plaintiffs' petition for a writ of *certiorari* as reported at 440 U.S. 935 (1979). The Order Re Three Judge Court filed by the district court on September 13, 1979, is not officially reported and appears in the appendix at page 28. The order of the Ninth Circuit summarily denying a petition for writ of mandamus filed by plaintiffs seeking review of the Order Re Three Judge Court is not officially reported and appears at page 27 of the appendix. The order of this Court similarly denying plaintiffs' petition for writ of mandamus is reported at 445 U.S. 959

Seymour, Richard L. Corbit, Harold Edwards, Donald E. Meyer, William C. Waggoner, Richard Gannon, and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, plaintiffs; Pension Benefit Guaranty Corporation, a nonprofit corporation established within the Department of Labor of the United States of America, defendant; Woodward Sand Company, Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., plaintiffs-in-intervention.

(1980) and appears at page 26 of the appendix. The opinion of the Ninth Circuit reversing and remanding the district court with directions to convene a Three Judge Court is reported at 673 F.2d 1110 (1982) and appears in the appendix at page 17.

JURISDICTION.

Appellants ("Trustees") filed this action June 17, 1975, pursuant to 29 U.S.C. § 1303(f) to recover amounts paid as "premiums" to appellee Pension Benefit Guaranty Corporation ("PBGC") and for a declaratory judgment pursuant to 28 U.S.C. § 2201 holding the pension plan ("Plan") administered by the Trustees to be a "defined contribution plan" outside the jurisdiction of PBGC. Alternatively, if the foregoing relief were denied, the action sought a determination that Title IV of ERISA [29 U.S.C. §§ 1301-1381; 88 Stat. 1003-1035] was unconstitutional and a permanent injunction restraining PBGC from enforcing the statute with respect to the Plan. The constitutional issues and the availability of injunctive relief were required to be heard and determined by a district court of three judges pursuant to 28 U.S.C. § 2282.

The judgment of the Three Judge Court denying a permanent injunction against enforcement of the federal statute in this action was entered on December 4, 1984. On December 17, 1984, PBGC filed a motion to alter or amend the judgment in respects which are of no import to the matters to be dealt with on this appeal. The Trustees filed a notice of appeal in the district court on January 31, 1985, within the time permitted by 28 U.S.C. § 2101(b). After the District Court denied PBGC's post-judgment motions for attorney's fees by order filed March 15, 1985.

This Court has jurisdiction under 28 U.S.C. § 1253 to determine this appeal from the final judgment denying a

permanent injunction in a civil action required to be heard and determined by a district court of three judges.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Fifth Amendment, United States Constitution:

> "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The challenged federal statutes are contained in Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA") and in the amendments of ERISA enacted by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The challenged statutes in their entirety are comprised of 29 U.S.C. §§ 1381-1405, §§ 1306-1307 and § 1461(c)(2) [formerly § 1381(c)(2)]. The essential statutory provisions are as follows:

29 U.S.C. § 1381(a) [94 Stat. 1217]:

> "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

29 U.S.C. § 1382 [94 Stat. 1218]:

"When an employer withdraws from a multiemployer plan, the plan's sponsor, in accordance with this part, shall —

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer."

29 U.S.C. § 1307 [88 Stat. 1013; 94 Stat. 1298, 1300]:

"The plan administrator of each plan shall pay the premiums imposed by the corporation under this subchapter with respect to that plan when they are due . . ."

29 U.S.C. § 1461(c)(2) [formerly 29 U.S.C. § 1381(c)(2); 88 Stat. 1034; 94 Stat. 1267]:

"The corporation may, in its discretion, pay benefits guaranteed by this subchapter with respect to a multiemployer plan which terminates after September 2, 1974, and before August 1, 1980, if —

(A) the plan was maintained during the sixty months immediately preceding the date on which the plan terminates, and

(B) the corporation determines that the payment by the corporation of benefits guaranteed under this subchapter with respect to that plan will not jeopardize the payments the corporation anticipates it may be required to make in connection with benefits guaranteed under this subchapter with respect to multiemployer plans which terminate after July 31, 1980."

STATEMENT OF THE CASE.

The Trustees administer the Operating Engineers Pension Plan ("Plan") according to a written Agreement Establishing the Operating Engineers Pension Trust made in 1960 pursuant to § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended [29 U.S.C. § 186(c)(5)]. This labor-management Pension Trust receives contributions from several thousand employers under written collective bargaining agreements covering employees in the construction industry of Southern California and Southern Nevada. The employers periodically enter into collective bargaining agreements with the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), by which the employers agree to abide by the Trust Agreement and to pay certain contributions to the Pension Trust each month. The amount contributed by each employer is determined by multiplying the employees' hours of employment by an hourly rate specified in the collective bargaining agreement. Under the express terms of the Trust Agreement and the Plan, the employer's sole obligation to the Pension Trust is to pay the contributions required by the collective bargaining agreement. The Trust Agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the Pension Trust. This is true even though the contributions may be insufficient to pay the benefits described in the Plan. The benefits described in the Plan are established by the Trustees based on an actuarial estimate of the sufficiency of Trust assets to pay the benefits, and the Trustees retain authority under the Trust Agreement to adjust the benefits in light of actual experience and other actuarial considerations. *App., infra,* pp. 32-33 (581 F.2d at 731).

Because under the Trust Agreement and the Plan the employer promises only a fixed contribution, not a fixed benefit, the Trustees in 1975 sought an administrative ruling by PBGC that the Plan is a "defined contribution plan" excluded from PBGC's jurisdiction by the statute. PBGC ruled that the Plan is a "defined benefit plan" and claimed the right to receive payments of annual "premiums" from the Pension Trust. This action by PBGC had the effect under the statute of treating contributing employers of the Pension Trust as liable for "employer contingent liability" in amounts as much as 30% of the employer's net worth if the Plan were to terminate with insufficient assets to pay the benefits described in the Plan.

The Trustees filed this action on June 17, 1975, seeking recovery of the "premiums" paid to PBGC and a determination that the Plan was a "defined contribution plan" under the statute. Alternatively, the Trustees' complaint sought a permanent injunction against enforcement of the statute on grounds that the statute takes the property of the Pension Trust and its contributing employers in violation of the Due Process Clause and the Taking Clause of the Fifth Amendment and unconstitutionality impairs the contract rights of the Trustees, the employers, Local 12 and the participants of the Plan. On February 12, 1976, the District Court granted summary judgment to the Trustees on grounds that the Plan is properly regarded as a "defined contribution plan" particularly because the employer has promised no "fixed benefits" and to do otherwise would be "to force upon the employer a greater obligation and liability than he had agreed to in his contract." *App.*, pp. 49, 50 (419 F.Supp. at 740, 741). On appeal, the Ninth Circuit reversed, based upon statutory interpretation to the effect that "[t]he precise intent of [the federal statute] was to

impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan." *App.*, p. 35 (581 F.2d at 732). This Court denied the petition for *certiorari* filed by the Trustees. 440 U.S. 935.

On remand, the district court declined to convene a three judge court on grounds that the constitutional issues raised by the Trustees were insubstantial, citing a 1947 decision of this Court involving a challenge of the Home Owner's Loan Act of 1933. *App.*, p. 29. Following summary denials of the Trustees' petitions for writ of mandamus in the Ninth Circuit and this Court, on appeal the Ninth Circuit reversed and remanded with directions that a three judge court be convened to determine the substantial constitutional questions raised. *App.*, p. 25 (673 F.2d at 1114).

During the litigation to convene a three judge court, ERISA was amended by MPPAA to create "withdrawal liability," by which an employer whose contract obligation to pay contributions to the Pension Trust had ceased would be required to pay to the Pension Trust amounts calculated in accordance with the statute. On remand from the second appeal, the district court requested that a three judge court be convened on June 21, 1982. The Trustees filed an amended complaint addressing the amended statute on August 16, 1982. By order filed December 14, 1982, four employers whose collective bargaining agreements had been terminated and who had received notifications from the Pension Trust of withdrawal liability claims as required by the statute, were granted leave to intervene in the action.[2]

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[2]The intervening employers were Woodward Sand Company, Inc., Penfield & Smith, Inc., Klema Engineering, Inc., and Municipal Engineers, Inc., designated as plaintiffs-in-intervention in the district court and as appellees herein pursuant to Rule 10.4.

The Trustees' amended complaint challenged the amended statute imposing "withdrawal liability" on employers whose contractual obligations to the Pension Trust had ceased on grounds that the statute takes the private property of the employers for the private use of others and provides no compensation for the property taken. In addition, the amended complaint maintained the challenge of the original statutory requirement of "premium" payments to PBGC and further contended that the Due Process Clause is violated by the amended premium requirements when the "withdrawal liability" provisions are excised from the statute.

The Trustees filed a motion for summary judgment on May 13, 1983, and the intervening employers filed a parallel motion for summary judgment on May 16, 1983. The Trustees contended that the statutory imposition of "withdrawal liability" on employers whose contract obligations to the Pension Trust had ceased would be a taking of private property for private use, and would be taking property without compensation, in violation of the Taking Clause of the Fifth Amendment. Further, the Trustees contended that the statutory provisions requiring payment of "premiums" by the Pension Trust to PBGC violate the Due Process Clause both before and after the 1980 amendments of the statutory scheme and, finally, that the statutory design for collection and expenditure of "premiums" by PBGC for coverage of plans terminated prior to the 1980 amendments violated the principle of Separation of Powers by delegating legislative authority to PBGC to determine the use of the funds.

The duly convened Three Judge Court heard oral arguments on the motions for summary judgment on October 24, 1983. On May 1, 1984, the Three Judge Court filed an Order Granting Summary Judgment To Defendant holding the statute to be constitutional and denying injunctive

relief. In disposing of the Trustees' contentions that the "withdrawal liability" statute takes property from the withdrawn employer and gives the property to the Pension Trust for private use without compensation to the employer, the Three Judge Court saw no need to determine whether the statutory use of property was public or private, or whether the "taking" was compensated. Instead, the Three Judge Court concluded "that no 'property' was involved in this case" based on reasoning that "the contractual right which insulates employers from further liability to the pension plans in which they participate is not 'property' within the meaning of the Takings Clause." *App.*, pp. 7-8. Regarding the Due Process Clause issues, the Three Judge Court summarily concluded that the statutory provisions existing between 1974 and 1980 were rational, and reached the same conclusion regarding the amended statute after further analysis. Finally, the Three Judge Court declined to reach the merits of the Separation of Powers issue on grounds that the issue became moot upon amendment of the statute in 1980. Judgment was entered on December 4, 1984. Post-judgment motions filed by PBGC on December 17, 1984, and January 7, 1985, seeking an award of attorney's fees against the intervening employers were denied by order filed March 15, 1985.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

1. WHETHER CONGRESS MAY TAKE PRIVATE PROPERTY FROM ONE PARTY AND GIVE IT TO ANOTHER FOR PRIVATE USE IN THE GUISE OF "REGULATING" A FULLY PERFORMED AND EXPIRED CONTRACT, WITHOUT COMPENSATING THE PARTY FROM WHOM THE PROPERTY IS TAKEN, PRESENTS ISSUES OF FUNDAMENTAL IMPORTANCE.

In *Pension Benefit Guaranty Corporation v. R. A. Gray & Co.*, — U.S. —, 104 S.Ct. 2709 (1984), this Court held that Congress did not violate the Due Process Clause by adopting a retroactive effective date for the MPPAA because the reasons for using a retroactive effective date were "eminently rational." *Id.*, S.Ct. at 2718.[3] That decision leaves unanswered whether a federal statute may create monetary obligations which would not otherwise exist between two private parties without violating the Taking Clause of the Fifth Amendment.

> "[H]owever 'rational' the exercise of [legislative] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States v. Security Industrial Bank*, — U.S. —, 103 S.Ct. 407, 410 (1982).

In *Security Industrial Bank*, the Court declined to accept the government's characterization of a statute as "general economic regulation which in effect transfers the property interest [in liens against personal property]

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[3]For purposes of the *R. A. Gray* decision, the Court assumed, without deciding, "that the prospective effects of the Act satisfy constitutional standards." *Id.* 104 S.Ct. at 2717, n. 7.

from a private creditor to a private debtor," rather than as "taking" property. *Id.*, 103 S.Ct. at 412.

Whether a governmental action goes beyond "regulation" and effects a "taking" involves several identified factors, including "the character of a governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Ruckelshaus v. Monsanto Co.*, ___ U.S. ___, 104 S.Ct. 2862, 2875 (1984). The essence of the federal action in this case caused one private citizen (an employer) to transfer property (money) to another private party (a pension trust). The economic impact of this "taking" is highly significant to the deprived party, since the withdrawal liability claim may exceed the net worth of an employer as a going concern (although such a claim against an employer in bankruptcy or liquidation may be limited between 30% and 80% of net worth). 29 U.S.C. § 1405. The employer's "reasonable investment-backed expectation" is that, after paying his just debts and fully performing his contract obligations, his property will remain his own, free of governmental action requiring its transfer to another party.

In *Ruckelshaus v. Monsanto Co., supra,* the Court recognized very broad authority on the part of Congress to determine whether property taken by statute is for a "public use." *Monsanto,* 104 S.Ct. at 2879. Nevertheless, some limit must exist on congressional authority to declare a "public use" or the constitutional requirement of a "public use" has no meaning. Moreover, while the public may have a broad range of interest in the ownership and use of particular property, *e.g.,* real estate or pesticides, *the Taking Clause should not permit Congress to have an interest in determining which of two private citizens owns money.* The Taking Clause was intended to protect minority factions (such as employers) from oppression at the

hands of a Congress influenced by majoritarian interests. The essence of that protection bars Congress from requiring one citizen to transfer his wealth to another citizen.

The taking of property effected by the withdrawal liability statute cannot be permitted to pass as a mere economic regulation of private contractual relations. The "conduct" of the employer giving rise to the statutory transfer of property is the employer's failure to undertake new contractual obligations when his existing agreement expires. Withdrawal liability then arises under the statute based on Pension Plan benefits previously adopted by the Trustees as independent fiduciaries outside the control of any contributing employer. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329-334, 101 S. Ct. 2789, 2794-96 (1981). The parties to the collective bargaining agreements and the Trust Agreement in this case created clear and unambiguous obligations which are fully performed when the agreements expire. If Congress has power to use such a contractual relationship as a basis for requiring transfer of property between private citizens, then Congress might similarly use other societal relationships as the regulated *nexus* giving rise to a statutory duty to transfer property to the favored private party. The Taking Clause was specifically intended to protect minority interests from such oppression by Congress, since " . . . a law that takes property from A. and gives it to B. . . . is against all reason and justice." *Calden v. Bull,* 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798).

The right to acquire and own property without fear of governmentally imposed forfeiture is still the personal freedom most fundamental to a flourishing democratic society [*see* M. Novak, *The Spirit of Democratic Capitalism,* pp. 83-84, 183, 175 (American Enterprise Institute/Simon & Shuster, 1982)], and is a key limitation on the power of the state over the individual. *Id.,* pp. 244,

307, 325, 397 (n. 14). The protection of this precious freedom by the Taking Clause will have become hollow, indeed, if the worth accumulated over a lifetime by one enterprising citizen can be taken by federal edict and given to others.

Even if the taking of property is for a public use, the MPPAA provides no compensation to the employer for the property taken. Although the MPPAA does not expressly withdraw the availability of a Tucker Act remedy for the employer, such a withdrawal of jurisdiction may be inferred by implication from the considerations that Congress would not wish to open the federal treasury to liabilities for privately created pension benefits and, if Congress wished to do so, the federal payments would likely have been made directly to the pension plans rather than by first taking property from the employer. *Cf., Monsanto,* 104 S.Ct. at 2881-82.

2. IF THE IMPOSITION OF "WITHDRAWAL LIABILITY" IS INVALID UNDER THE TAKING CLAUSE, THE REMAINING PROVISIONS OF THE MPPAA REQUIRING PAYMENT OF "PREMIUMS" TO PBGC SHOULD BE STRICKEN AS INSEPARABLE OR AS FAILING TO SATISFY THE RATIONALITY REQUIREMENT OF THE DUE PROCESS CLAUSE.

PBGC declared to Congress in 1979 that, without the use of property to be taken from employers as "withdrawal liability," the annual "premium" to be paid by multiemployer pension plans to PBGC would likely be in excess of $80.00 per employee participant rather than $1.40 per employee participant as enacted into law. Such a high "premium" would have been a severe drain of assets from healthy multiemployer plans. Rather than establish such a costly centralized "insurance" scheme,

Congress likely would have chosen a more moderate approach to securing the stability of pension benefits by further regulating the design and funding of benefits under multiemployer plans. Thus, Congress would not have enacted the premium provisions of the statute independently of the withdrawal liability provisions. *Cf., Buckley v. Valeo,* 424 U.S. 1, 108, 96 S.Ct. 612, 677 (1976). ERISA enacted in 1974 contains a severability provision, 29 U.S.C. § 1139, but the MPPAA does not. The remaining provisions of ERISA could continue to be "fully operative as a law," *I.N.S. v. Chadha,* —U.S. —, 103 S.Ct. 2764, 2775 (1983), but the "premium" collection provisions and withdrawal liability provisions affecting multiemployer pension plans enacted in 1980 are integrally related parts of the same "termination insurance" statutory scheme. Accordingly, the "premium" collection provisions enacted in 1980 should be stricken, either as an inseparable part of the statute invalidated under the Taking Clause, or because the premium statute fails the rationality test under the Due Process Clause when the withdrawal liability provisions are stricken.

3. THE "PREMIUM" STATUTE ENACTED IN 1974 VIOLATES THE DUE PROCESS CLAUSE AND THE SEPARATION OF POWERS PRINCIPLE THROUGH ITS EFFECTS ON MULTIEMPLOYER PENSION PLANS.

The 1974 coverage of Title IV of ERISA was enacted after wholly insufficient prior study of multiemployer plans and, as a result, the statute had highly destructive and uncertain effects upon the continued financial stability of such pension plans. The Due Process Clause should require more than merely that the action of Congress be capable of articulation in a "rational legislative purpose." *Cf., P.B.G.C. v. R. A. Gray & Co., supra,* 104 S.Ct. at 2718. Due process should encompass at least a minimum

standard of reasoned deliberation and understanding before legislation is enacted. Congress is not entitled to act arbitrarily and capriciously, even in the pursuit of a legislative purpose that is capable of later rationalization. Otherwise, individual rights may suffer permanent damage in ways which are not remedied by later functioning of the democratic process.

Moreover, the absence of prior study and understanding in ERISA's enactment resulted in a legislative delegation of authority to PBGC to use the funds collected as "premiums" without an "intelligible principle" for guidance. 29 U.S.C. § 1381(c), 88 Stat. 1035. Under the statute, PBGC was given discretion to pay benefits to participants of a terminated multiemployer plan so long as: (a) the plan had been in existence five years or more, (b) PBGC could determine that such payments would not "jeopardize" PBGC's ability to pay benefits which were later to become mandatory, and (c) reports of such discretionary actions were made to the responsible committees of Congress. Having no "intelligible principle" to control the use of funds, this statute is a forbidden delegation of legislative power. *Hampton & Co. v. U. S.*, 276 U.S. 394, 409, 48 S.Ct. 348, 352. Such "sharing" of legislative and administrative authority between PBGC and the congressional oversight committees does not comprise enactment of legislation "by the national Congress in [a] step-by-step, deliberate and deliberative process" as required by the Separation of Powers principle. *I.N.S. v. Chadha, supra,* 103 S.Ct. at 2788. The Three Judge Court declined to reach this issue on grounds of mootness resulting from amendment of the statute, but the issue is by no means moot when the Trustees continue to contest the payment of "premiums" claimed by PBGC under the 1974 statute and, in addition, the amended statute contains the same delegation of legislative authority with respect to expenditure of funds on behalf

of plans terminated before August 1, 1980. 29 U.S.C. § 1461(c)(2), 94 Stat. 1267.

CONCLUSION.

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

United States District Court
Central District of California
Three Judge Court
No. CV-75-2037-DWW

John L. Connolly, et al., etc.,
Plaintiffs,
vs.
Pension Benefit Guaranty Corporation, etc.,
Defendant.

Woodward Sand Co., Inc.;
Penfield & Smith, Inc;
Klema Engineering, Inc.; and
Municipal Engineers, Inc.
Plaintiffs in Intervention.

[Filed May 1, 1984]

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANT

Before: NELSON, Circuit Judge, and WILLIAMS and KELLEHER, Senior District Judges.

Plaintiffs, as Trustees, ("Trustees") of the Operating Engineers Pension Trust ("Pension Trust"), a joint labor-management employee benefit trust created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 [29 U.S.C. § 186(c)(5)], seek summary judgment against defendant Pension Benefit Guaranty Corporation ("PBGC") to the effect that certain provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"), as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA"), violate the Constitution

of the United States. In particular, the Trustees contend that the provisions of the MPPAA imposing "withdrawal liability" on employers who ceased participation in the Pension Trust violate the fifth amendment of the Constitution by requiring private property to be transferred from one party to a second party for the second party's private use and benefit. In addition, the Trustees contend that the provisions of ERISA, as originally enacted and amended, requiring payments of "premiums" by the Pension Trust to PBGC, failed to accord the due process of law guaranteed by the fifth amendment.

Actions seeking to enjoin the operation of acts of Congress were, until 1976, required to be heard by district courts with three judges on the panel. Since this lawsuit was begun in 1975, it is properly before this three-judge court. *Connolly v. Pension Benefit Guaranty Corp.*, 673 F.2d 1110, 1113-14 n.l (9th Cir. 1982).

There are no factual issues in dispute in this case. The date of intervenors' withdrawal from the pension plan is not relevant because intervenors do not challenge the retroactive application of the MPPAA. Such a challenge was rejected in *Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502 (9th Cir. 1983), *prob. juris. noted sub nom PBGC v. R.A. Gray & Co.*, 52 U.S.L.W. 3308 (Oct. 18, 1983) (hereinafter *"Shelter Framing"*). Moreover, this lawsuit challenges the facial constitutionality of Title IV and the MPPAA and does not challenge the statute as applied to particular persons. Hence, allegations regarding the particularized impact of the challenged legislation on the parties' individual situations are of little relevance. We find that no triable issues of fact exist and, for the reasons set forth below, grant defendant's motion for summary judgment.

BACKGROUND

In 1974, Congress attempted to regulate pension plans in a comprehensive manner.[1] To do so, it enacted the Employee Retirement Income Security Act. Title IV of ERISA was adopted to protect an employee's interest in his accrued benefit rights when a plan failed or terminated with insufficient funds. To achieve this goal, it established a system of termination insurance. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947, 951 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980). This termination insurance program is run by the PBGC. The PBGC is a governmental entity which receives no direct federal appropriations. Instead, it relies primarily on premium payments from private parties to insure against the failure of pension funds.

Upon enactment of ERISA in 1974, the PBGC immediately insured the receipt of all "non-forfeitable benefits" that had been earned by employees in single employer plans. A single employer who wished to terminate his plan was thus first required to notify the PBGC. 29 U.S.C. § 1341(a) (1976). If an investigation subsequently revealed that the plan lacked sufficient assets to pay its "non-forfeitable benefits," the PBGC itself became obligated for the shortfall. *Id.* at § 1342(c), (b).

Multiemployer plan benefits, in contrast, were not insured unconditionally upon enactment, but rather were guaranteed solely at the discretion of the PBGC until January 1, 1978. At that time, the guaranties were to become mandatory. *Id.* at 1381(c)(1). In the interim, the PBGC was authorized to determine on a case-by-case

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[1]Our discussion of the legislative history of the MPPAA is adopted from the discussion set forth in *Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025 (N.D. Ill. 1982), *aff'd*, No. 82-2081 (7th Cir. December 19, 1983) (hereinafter "*Peick*").

basis whether it would pay a terminating plan's beneficiaries the difference between the value of their guaranteed benefits and the value of the plan's assets on the date of termination. *Id.* at § 1381(c)(2).

There were several reasons why Congress chose not to insure all multiemployer plan benefits immediately in 1974. Congress viewed multiemployer plans as more stable and secure than single employer plans and thus saw less need to insure the former. *See Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 734 (9th Cir. 1978); 126 Cong. Rec. 12,179 (1980) (remarks of Rep. Biaggi). Moreover, Congress was concerned about the potential costs of such a program. Recognizing that it needed more time to study the entire problem, Congress delayed the effective date of the mandatory guarantee program and extended the PBGC's discretionary authority through June 30, 1979. Pub. L. No. 95-214, 91 Stat. 1501 (1977). At the same time, Congress ordered the PBGC to prepare a comprehensive report analyzing the multiemployer situation.

After extensive consideration, the MPPAA was enacted, affecting a variety of major changes in ERISA. Under the MPPAA, the PBGC is required to guarantee certain benefits of covered multi-employer plans. The level of benefits guaranteed by the PBGC under the MPPAA is lower than the level guaranteed prior to the passage of the MPPAA. The premiums employers must pay the PBGC for insurance are significantly higher under MPPAA. The PBGC is also authorized to provide financial assistance to plans which cannot meet their current financial obligations. This permits a plan which is having financial difficulties to continue, and allows employers to continue making contributions to an insolvent plan without incurring liability under ERISA. Under the MPPAA, the insurable event for a plan is its insolvency,

rather than its termination. The MPPAA further provides that the plan benefits are to be funded over a shorter period of time than formerly required and requires arbitration to resolve a wide variety of disputes between trustees and employers. Plaintiffs raise a number of constitutional challenges to the provisions of Title IV and the MPPAA.

DISCUSSION

A. THE TAKINGS CLAUSE.

Plaintiffs argue that contractual provisions creating investment backed expectations constitute compensable property rights just as much as actual ownership of property. Relying primarily on the recent Ninth Circuit case of *Midkiff v. Tom*, 702 F.2d 788 (9th Cir. 1983), *prob. juris. noted*, 52 U.S.L.W. 3342 (November 1, 1983), they argue that employers would normally be required to liquidate other property, such as land, to pay withdrawal liability claims.

Midkiff, on its face, suggests that it does not control the case before us. *Midkiff* insists that if it had been reviewing "a *congressional* determination that there was a public use, not . . . a state legislative determination," it might have reached a different result. 702 F.2d at 798. State legislative pronouncements, *Midkiff* concludes, are entitled to less deference than Congressional determinations. *Id.* Since the case before us, unlike *Midkiff*, involves a congressional finding, we could merely cite this analysis and move on. We choose not to do this, however, because to do so would be to endorse the *Midkiff* logic.

The *Midkiff* analysis seems inconsistent with what little Supreme Court precedent is available. The Supreme Court has never written that state legislative determinations are entitled to less deference than congressional

determinations. To make it seem othewise, *Midkiff* culls sentences from two unrelated cases, written 15 years apart, and stands them in juxtaposition. Thus, it offers this statement:

> when *Congress* has spoken on the subject 'Its decision is entitled to deference until it is shown to involve an impossibility'

T.V.A. v. Welch, 327 (1925) U.S. 546, 552 (1946), *quoting Old Dominion Land Co.*, 269 U.S. 55, 66 (1925), in contrast with this one:

> where a state legislative determination is involved: "[i]t is well established that . . . the question what is a public use is a judicial one."

Cincinnati v. Vester, 281 U.S. 439, 446 (1930), and concludes that state legislative findings are accorded little deference. 702 F.2d at 798. The Supreme Court did not intend, in either of these cases, to draw a line between state and federal legislative judgments. In fact, the quotation from *Vester* is equally applicable to Congress, and that from *T.V.A.* equally applicable to the states. Thus, *Midkiff* has created a distinction that the Supreme Court has never recongnized and has, in fact, implicitly rejected. *E.g., Berman v. Parker*, 348 U.S. 26, 31-32; *United States v. Gettysburg Electric Ry. Co.*, 160 U.S. 668, 680 (1896).

Moreover, common sense suggests that state legislative determinations, if they are to be treated differently than congressional determinations, should be granted more, not less, deference. The tenth amendment reserves power to the states. To at least one commentator, "it seems clear that the reserve power of the state in this area is greater than the power of the federal government when the federal government is acting within the boundaries of a

state." Conahan, *Hawaii's Land Reform Act: Is It Constitutional?* 6 Hawaii B.J. 31, 37 (1969). Thus, the distinction drawn in *Midkiff* between state and federal legislative findings seems an unlikely one.

The *Midkiff* distinction, however, is unnecessary to our holding here because we find that no "property" was involved in this case. Traditionally, it has been understood that to make a claim under the takings clause, the claimant must prove that "property," in the sense of "the group of rights inhering in the citizen's relation to [a] physical thing," has been "taken." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). There has been no "set formula" which the Supreme Court has evolved to determine when " 'justice and fairness' require that economic injuries caused by public action be compensated by the government. . . ." Rather, the Court has examined the "taking question by engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action — that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

We find that the contractual right which insulates employers from further liability to the pension plans in which they participate is not "property" within the meaning of the takings clause. Although contractual rights may constitute property, *see Lynch v. United States*, 292 U.S. 579 (1934), they must be very explicit to do so. In both *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935), and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the parties sought to protect interest in real property. Here, in sharp contrast, we are asked to protect

a mere contractual arrangement. The importance of this distinction was reaffirmed by the Supreme Court in the recent case of *Security Industrial Bank v. United States,* __ U.S. __, 103 S. Ct. 407 (1983). Since appellants are unable to identify any interests other than their purely contract-based "right" to avoid liability for further contributions to the pension plans to which they participate, we find no property at issue in this case. We refuse to consider the contingent right to escape one's own liability, in derogation of statutory policies, as property under the takings clause. Accordingly, we find no constitutional violation. *See Peick v. Pension Benefit Guaranty Corporation,* No. 82-2081, slip op. at 53 (7th Cir. Dec. 19, 1983); *Dorn's Transportation Inc. v. I.A.M. National Pension Fund, Benefit Plan A,* No. 82-1141 (D.D.C. January 19, 1984) (hereinafter "*Dorn's*"); *Speckman v. Paddock Chrysler Plymouth, Inc.,* 565 F. Supp. 469, 472-73 (E.D. Mo. 1983). Since we resolve this issue on the basis of our finding that no "property" is affected by the MPPAA, we need not reach the questions whether a taking occurred or whether such a hypothetical taking would be for a public purpose.

B. DUE PROCESS ANALYSIS.

If they do not affect property, provisions of Title IV and the MPPAA may yet be unconstitutional if they are not grounded in a rational basis. Plaintiffs argue that Title IV and the MPPAA achieve the reverse of their intended results. Specifically, Title IV and the MPPAA increase pension plan terminations and disrupt pension plans in general. Thus, plaintiffs argue, these statutes fail the rational basis test.

The burden of proof is on the challenging party to prove that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15-16 (1976). Since the due process challenge here involves

only economic rights in general, this court merely must determine whether the statutes bear a rational relationship to their legitimate ends. *United States v. Carolene Products,* 304 U.S. 144 (1938); *Beller v. Middendorf,* 632 F.2d 788, 807-08 (9th Cir. 1980). We find that both Title IV and the MPPAA are founded in rational bases.

To assess the constitutionality of the withdrawal liability provisions of the MPPAA, we must apply the analysis first set forth by the Seventh Circuit in *Nachman Corp. v. PBGC,* 592 F.2d 947, 960-63 (7th Cir. 1979), *aff'd on other grounds,* 446 U.S. 359 (1980) (hereinafter *"Nachman"*). *See Textile Workers Pension Fund v. Standard Dye and Finishing Co., Inc.,* No. 83-7004 (2d Cir. Jan. 9, 1984) (hereinafter *"Textile Workers"*). Although much of the *Nachman* analysis is derived from contract clause considerations, those considerations are applied to the federal government through the due process clause. *See Shelter Framing,* 705 F.2d at 1510-11; *Republic Industries, Inc. v. Teamsters Joint Council No. 83 of Virginia Pension Fund,* 718 F.2d 628 (4th Cir. 1983). *But see Dorn's,* slip. op. at 15. After pointing out that rationality is determined by comparing the identified problem to the nature and scope of the burden imposed to remedy it, the *Nachman* court considered four separate factors: 1) the reliance interest of the parties affected; 2) whether impairment of the private interest is effected in an area previously subjected to regulatory control; 3) the equities of imposing the legislative burdens; and 4) the inclusion of statutory provisions designed to limit and moderate the impact of the burdens. 592 F.2d at 960. The court emphasized that these four factors were only to be used to determined whether the legislation represented a rational means to a legitimate end, but were not to be used to express judicial approval or disapproval of the balance struck by Congress. *See id.* We address each of these four factors in turn.

First, we must analyze the reliance interest of the parties affected by the statute. Intervenors insist that they have relied on a basic contractual agreement that they will not have to pay more to the pension plan than their original required contributions. In *Nachman,* the court found that the employees' reliance on receiving their vested benefits outweighed the employer's reliance on its ability to terminate its obligations without continuing liability. Concededly, *Nachman* involved a single employer plan, while the instant case involves multiemployer plans where the participants do not have specific promises from their own employers to pay their pension benefits. "It is nonetheless reasonable and fair to conclude that plan participants did expect their employers to continue making contributions necessary to support these expected benefits." *Textile Workers,* slip op. at 943. We conclude that the employers' reliance in their business dealings on their collective bargaining agreements is offset by employees' reliance in their personal affairs on obtaining vested pension benefits. The first *Nachman* factor does not weigh decidedly in favor of either party in this lawsuit.

The second *Nachman* factor is whether impairment of the private interest is affected in an area previously subjected to regulatory control. We find this factor to weigh heavily against the employers here. In *Nachman,* the court wrote that since plan terminations had previously been subject to federal regulation, an employer's expectation that it would not have to fund its plan's vested benefits could be given less weight by Congress. 592 F.2d 962. In that case, the presence of Internal Revenue Service regulations governing plan terminations mitigated *Nachman*'s claim of surprise when ERISA was enacted with termination liability provisions. *Id.* at 962, n.33. "Just as the employer in *Nachman* was charged with constructive notice that its rights might someday be subject to congressional regulation, so too were plaintiffs

here. Notice was everywhere." *Textile Workers,* slip op. at 945; *see Shelter Framing Corp. v. Pension Benefit Guaranty Corp.,* 705 F.2d 1502, 1512 (9th Cir. 1983) ("Pension plans have, of course, been subject to regulation at least since the passage of ERISA in 1974.") Before the employers decided to close their operations, there had been decades of pre-MPPAA regulations of multiemployer plans under a variety of federal labor and tax laws. *See Peick,* 539 F. Supp. at 1044. "The enactment of ERISA in 1974 provided a comprehensive regulatory scheme mandating employer withdrawal liability in the single employer context." *Textile Workers,* slip op. at 945. This "afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created." *Peick,* 539 F. Supp. at 1044-45. (footnote omitted). Unlike *Shelter Framing,* we are not here addressing the effect of "legislative changes which extract a heavy fine for action taken *before* the changes win congressional approval." 705 F.2d at 1512 (emphasis added). Here, of course, the actions are taken *after* congressional approval. We find that the MPPAA's effect was not completely unexpected, and that Act operated in an area that Title IV had previously regulated. The second *Nachman* factor therefore favors the constitutionality of the MPPAA.

The third *Nachman* factor involves weighing the equities of imposing the burden of withdrawal liability on the employer. Here, intervenors insist that the MPPAA has radically changed the pension plan "ground rules" and unfairly burdens employers who withdraw from pension plans.

When drafting the MPPAA, Congress was forced to determine who should bear the burden of any shortfalls in a multiemployer plans. We cannot find it unreasonable for Congress ultimately to decide to require the withdrawing

employers to bear their share of the burden of funding, rather than to leave the remaining employers "holding the bag." *See* 126 Cong. Rec. 20,234 (1980) remarks of Senator Matsunaga).

The MPPAA itself clearly demonstrates that Congress did not place the entire burden of underfunding on the withdrawing employers. *Textile Workers*, slip op. at 947. Congress, for instance, required employers to make higher minimum contributions than under ERISA, 29 U.S.C. § 1423 (Supp. V 1981); the PBGC's insurance premiums were increased, *id.* § 1306; funds were made available to supplement plan assets so that insolvent plans could continue to operate with reduced benefit payments and without requiring prohibitively high employer contributions, *id.* § 1431; participant's benefits were made subject to limited reductions in financially troubled plans, *id.* § 1426; and the PBGC's guarantee was reduced, *id.* § 1322(a). *See Peick*, 539 F. Supp. at 1051-52; *Textile Workers*, slip op. at 948. Our view of prospective legislation is, of course, quite different from the "disfavor of retrospective legislation" that lay at the core of *Shelter Framing*. 705 F.2d at 1512. We conclude, on balance, that the equities weigh in favor of the employees.

The final *Nachman* factor is whether the statute included provisions to limit and moderate the effect of the burdens it imposed. 592 F.2d at 962-63. The intervenors assert that the MPPAA has almost no moderating features. In a sense, they are correct. The statute does mitigate the effect of withdrawal liability to some extent by: a) limiting liability only to employers who voluntarily withdraw without a successor, 29 U.S.C. §§ 1384, 1390 & 1398, b) limiting the overall amount of withdrawal liability by a *de minimis* rule to eliminate the burden on small

employers, 29 U.S.C. §§ 1389, 1405, c) permitting periodic installment payments of withdrawal liability, 29 U.S.C. § 1399(c), and d) allowing pension plans to fashion their own withdrawal rules, 29 U.S.C. § 1404. These provisions, however, may provide "little, if any, comfort for the employers." *Shelter Framing*, 705 F.2d at 1514. Accordingly, we find the fourth *Nachman* factor to weigh against the MPPAA's constitutionality. On balance, however, the *Nachman* analysis reveals that the MPPAA is constitutional.

C. THE CONTRACT CLAUSE ISSUE.

The employers claim that the MPPAA retroactively impairs contractual relations in violation of the contract clause. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). They argue that, like the statute struck down in *Allied*, the MPPAA grossly distorts employers' contractual obligations to their former employees by imposing obligations substantially beyond the terms of negotiated employment contracts.

Reliance on *Allied* is misplaced. In that case, the Supreme Court struck down as violative of the contract clause a Minnesota statute imposing pension fund liability on an employer. However, "a number of critical differences exist between the Minnesota statute and the MPPAA. Most significantly, *Allied* involved a state statute, not an act of Congress. The prohibition against impairing the obligation of contracts is directed against state statutes." *Textile Workers*, slip op. at 958. We find the MPPAA to pass contract clause muster.

D. REMAINING CONSTITUTIONAL CONTENTIONS.

Plaintiffs assert that through Title IV Congress unconstitutionally delegated legislative discretion to appropriate agency funds. The argument is that it is improper to allow the PBGC to decide whether to pay unfunded vested benefits of plans that terminate before January 1, 1978. *See* 29 U.S.C. § 1181(c)(1) (repealed 1980). We find this issue moot since, as of July 1, 1980, the PBGC no longer has this discretionary power.

In the final pages of their Memorandum of Points and Authorities, intervenors raise several constitutional challenges to the MPPAA. They assert that the statute (a) involves a taking of property without a hearing, analogizing MPPAA withdrawal liability to a writ of garnishment, (b) fails to allow judicial participation prior to a seizing of property, (c) violates due process by giving the trustees' calculations of withdrawal liability a presumption of correctness, (d) deprives intervenors of a right to a jury trial, and (e) is unconstitutionally vague.

Intervenors were allowed to join in this litigation "on the condition that they do not litigate beyond the scope of plaintiffs' first amended complaint." *Connolly v. PBGC*, CV 75-2037 (C.D. Cal. 1982) (order granting intervention). The first amended complaint focuses on the MPPAA's disruption of existing collective bargaining relationships, and its alleged unconstitutional taking of property without compensation or rational basis. Nowhere in the complaint are there facts alleged which would support the additional procedural due process claims advanced by the intervenors. These contentions are hereby ordered stricken from the record. They are outside the confines of the first amended complaint and beyond the scope of permissive intervention.

CONCLUSION

Summary judgment is granted in favor of the defendant as to all of plaintiffs' and intervenors' facial constitutional challenges. We do not, however, resolve the constitutionality of the statutes as applied to particular parties. That issue, not raised by this lawsuit, is being litigated in another district.

SO ORDERED.

The Clerk of the Court shall serve copies of this Order, by United States Mail, upon the attorneys of record for the parties appearing in this action.

Dated: April 25, 1984

/s/ Dorothy W. Nelson
DOROTHY W. NELSON
United States Circuit Judge
Sitting by Designation

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Judge

/s/ Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

No. 81-5361

D.C. No. 75-2037 DWW

United States Court of Appeals
For the Ninth Circuit

John L. Connolly, C.V. Holder,
Howard C. Dennis, John C. Maxwell, James J. Kirst,
C. William Burke, Kenneth J. Bourguignon,
Joseph H. Seymour, Richard L. Corbit,
Harold Edwards,
Donald E. Mier, William C. Waggoner, Richard Gannon
and
Alfred Harrison, each in his respective capacity
as Trustee of the Operating Engineers Pension Trust,
Plaintiffs-Appellants,

v.

Pension Benefit Guaranty Corporation,
a non-profit corporation established within the
Department of Labor
of the United States of America,
Defendant-Appellee.

Appeal from tne United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding
Argued and submitted March 5, 1982
[Filed April 9, 1982]

OPINION

Before: Wright, Alarcon and Reinhardt, Circuit Judges
Alarcon, Circuit Judge:

Members of the Board of Trustees [Trustees] of the Operating Engineer's Pension Trust [Trust], filed a complaint in the district court on June 17, 1975, seeking

declaratory judgment, damages, and injunctive relief against defendant, Pension Benefit Guaranty Corporation [PBGC]. Trustees sought to resolve whether their pension plan was a "defined contribution plan" intended by the Employment Retirement Income Security Act [ERISA] to be outside the purview of PBGC or a "defined benefit plan" governed by PBGC 29 U.S.C. §§ 1002(34)-(35), 1321(b)(1). If the pension plan was determined to be a defined benefit plan, Trustees alleged certain retroactive liabilities and pension plan termination insurance provisions of ERISA were in violation of the due process and taking clauses of the fifth amendment and acted as an impairment of contract.

The district court held the pension plan to be a defined contribution plan and enjoined PBGC from acting in any manner inconsistent with that interpretation. *Connolly v. PBGC,* 419 F. Supp. 737, 741-42 (C.D.Cal. 1976). PBGC was also required to return the $12,043.00 termination insurance premium paid by Trustees. *Id.* at 742.

This court reversed the district court, holding Trustees' pension plan to be a defined benefit plan, and remanded the case for consideration of the constitutional questions posed by Trustees. *Connolly v. PBGC,* 581 F.2d 729, 734-35 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979).

Trustees made application in the district court for an order convening a three-judge court. On September 13, 1979, the district court refused to issue the order on the basis that Trustees raised no substantial constitutional questions. Trustees' motion to reconsider the ruling was denied.

On November 2, 1979, Trustees filed a petition for writ of mandamus in this court to compel the convening of a three-judge court. We summarily denied that petition. *Connolly v. Williams,* No. 79-7580 (9th Cir. Jan. 14, 1980). Trustees' motion in the Supreme Court for leave

to file a petition for writ of mandamus was similarly denied. *Connolly v. United States District Court,* 445 U.S. 959 (1980).

After holding PBGC's motion for summary judgment under submission during the mandamus proceedings, the district court granted summary judgment in favor of PBGC on March 26, 1981 on the ground that Trustees' claims presented no substantial constitutional questions. Trustees appealed to this court. We reverse.

The issues before this court are: (1) did the summary denial by this court of a petition for writ of mandamus to compel the convening of a three-judge court foreclose further appellate review of the merits of the claim; (2) did the constitutional challenge to the required payment of pension plan termination insurance premiums raised by Trustees, become moot; and (3) did the district court err in ruling that Trustees' claim raises no substantial constitutional questions.

I. FACTS

The Operating Engineers Pension Trust is a joint labor-management trust created in 1960. The trust agreement created the pension plan [Plan] administered by Trustees. The purpose of the Trust is to create a pension fund to which a number of employers make contributions, and from which their employees may draw benefits when they reach a stated age of retirement. The plan is a defined benefit plan subject to regulation by ERISA. *Connolly,* 581 F.2d at 734-35.

The employers periodically enter into collective bargaining agreements to establish the amount of their contribution to the Plan. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement. According to Trustees, hourly rates have ranged

from $.05 per hour in 1960 to $1.50 per hour at the time the complaint was filed in 1975. The trust agreement clearly states that the employers' obligation for pension benefits is ended when the amount agreed to in collective bargaining is paid, even if the contributions are insufficient to pay the benefits under the Plan.

ERISA established PBGC and provided that PBGC would guarantee the payment of certain pension benefits to participants of defined benefit plans such as the Plan here. 29 U.S.C. §§ 1302, 1322. An employer subject to ERISA could in certain instances be liable to PBGC for the guaranteed benefits up to an amount not exceeding 30 percent of the net worth of that employer. 29 U.S.C. § 1362 (amended 1980). Collection of annual insurance premiums was also authorized. 29 U.S.C. § 1306 (amended 1980). ERISA thereby imposed new and in some cases retroactive liabilities upon employers contributing to such plans. *Connolly,* 581 F.2d at 732.

II. SUMMARY DENIAL OF A WRIT OF MANDAMUS

PBGC maintains that this court should not review Trustees' previously unsuccessful efforts to convene a three-judge court. PBGC premises this argument on the assumption that this court's denial of an interlocutory petition for writ of mandamus, without opinion, establishes the law of the case and therefore further review of the matters raised in the petition for a writ by way of an appeal from a final judgment is foreclosed. In the Ninth Circuit "[w]hen a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court. *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977); *see also, Corex Corp. v. United States,* 638 F.2d 119, 122 (9th Cir. 1981). In the case *sub judice,* the appellate

court's order stated simply that "[u]pon due consideration, the petition for writ of mandamus is denied." (Excerpt of Record at 290). We disagree with PBGC that this perfunctory disposition expressly or impliedly reached the merits of the petition for mandamus and established the law of the case. PBGC's argument misperceives the extraordinary nature of the writ of mandamus. Ordinarily legal issues are resolved through appellate review after judgment has become final in the trial court.

Our research has failed to disclose any opinion of a federal court that precisely addresses PBGC's contention that summary denial of a writ of mandamus disposes of the merits of the petition. We suspect that this dearth of authority is due to the fact that no other litigant has previously made so bold a claim. The California Supreme Court, however, has spoken on this issue. We are persuaded by the well reasoned opinion in *People v. Medina,* 6 Cal. 3d 484, 492 P.2d 686, 99 Cal. Rptr. 630 (1972). In *Medina,* defendant's pretrial application for an extraordinary writ to review the denial of his motion to suppress evidence was summarily denied. *See id.* at 487, 492 P.2d at 687, 99 Cal. Rptr. at 631. The government argued that this ruling established the law of the case precluding further review of the issue on appeal from a judgment of conviction. *Id.* at 490-91, 492 P.2d at 690, 99 Cal. Rptr. at 634. The California Supreme Court rejected this contention. The court held instead that a denial without opinion of a pretrial petition for a writ does not constitute a determination on the merits. *Id.* at 493, 492 P.2d at 691, 99 Cal. Rptr. at 635. The court recognized that any one of a number of reasons might impel appellate justices to deny a petition for a pretrial writ without opinion. "(G)iving such a minute order conclusive effect on an appeal from a subsequent judgment of conviction would amount to improper conjecture

and surmise as to the theoretically possible mental processes of the justices." *Id.*

In *Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977), this court identified five specific guidelines which should be considered in determining whether to issue a writ of mandamus. These guidelines are:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 654-55 (citations omitted).

The panel of this court that reviewed the petition for mandamus in this matter gave no clue as to the reasons for its action. Any of the criteria set forth in *Bauman* might have motivated the court to deny Trustee's petition. We decline to speculate. We hold instead that a summary denial of a petition for a writ of mandate does not establish the law of the case.

III. MOOTNESS

PBGC argues that Trustees' constitutional challenges to ERISA have become moot. A case is moot if it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). *See also, Friends of the Earth, Inc. v. Bergland*, 576 F.2d 1377, 1378 (9th Cir. 1978) (where activities sought to be enjoined had already occurred, the action was moot). In the case at bar, no events

have occurred which foreclosure controversy regarding Trustees' attacks on ERISA. Trustees challenge the constitutionality of retroactive liability provisions provided for by ERISA as well as the constitutionality of the requirement that Trustees pay pension plan termination insurance premiums. PBGC conceded in their written briefs that Trustees' due process challenge to the requirement to pay premiums is not moot. Their brief states: "[Trustees have] been assessed for termination insurance premiums under provisions of 29 U.S.C. §§ 1306 and 1307. Accordingly, a due process challenge to the requirement to pay premiums is not moot." PBGC's Brief at 11-12 (footnote omitted). At oral argument, PBGC reiterated that although ERISA had been substantially amended in 1980, the requirement that insurance premiums must be paid was not altered. Trustees' challenge to this provision of ERISA generates a present live controversy." We need not reach the question whether the 1980 amendments render Trustees' challenge to the retroactive liability provisions of ERISA moot.

IV. SUBSTANTIAL CONSTITUTIONAL QUESTIONS

PBGC and Trustees agree that substantial questions of constitutionality require the convening of a three-judge court. 28 U.S.C. §§ 2282, 2284.[1] The dispute we must

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[1]Act of June 25, 1948, ch. 646, 62 Stat. 968 (repealed 1976) (28 U.S.C. § 2282) provides that "(a)n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 [delineating, *inter alia*, procedures for convening a three-judge court] of this title." It was repealed in 1976; however, the repeal was made inapplicable to actions commenced on or before Aug. 12, 1976. Act of Aug. 12, 1976, Pub. L. No., 94-381, §§ 7,

resolve is whether Trustees' challenges are constitutionally insubstantial. "A claim is insubstantial [for the purposes of convening a three judge court] only if ' "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." ' " *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (quoting *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (quoting *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105 (1933))); *see also, Lopez v. Butz*, 535 F.2d 1170, 1171 (9th Cir. 1976). That claims are of doubtful merit does not render them insubstantial for the purposes of convening a three-judge court. *Goosby*, 409 U.S. at 518. PBGC contends that the constitutional claims raised by Trustees challenging the requirement to pay insurance premiums have been rendered insubstantial by five prior determinations of the Supreme Court.

We disagree. None of the cases relied upon by PBGC involves a constitutional challenge to ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980) resolved only the question of whether ERISA had been "properly construed to impose continuing liability on an employer that had lawfully terminated its plan prior to the effective date of the minimum vesting standards contained in Title I of ERISA." *Id.* at 368. The court expressly refused to reach any constitutional challenges. *Id.* In *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), the constitutional issues addressed by the court pertained to the Agricultural Marketing Agreement Act of 1937 which regulated the handling of milk in the New York metropolitan area. *Id.* at 539-40. *Helvering v. Davis*, 301 U.S. 619 (1937) and *Steward Machine Co. v. Davis*, 301 U.S. 548

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90 Stat. 1119 (1976), and does not therefore apply to the instant case which was originally filed on June 17, 1975.

(1937), decided the same day, dealt with the constitutionality of portions of the Social Security Act of August 14, 1935. *Helvering*, 301 U.S. at 638-39; *Steward*, 301 U.S. at 573, 578. Finally, the statute under constitutional attack in *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), was a state statute. *Id.* at 109. None of these cases forecloses the subject of the constitutionality of mandatory pension plan termination insurance premium payments by employers, or the constitutionality of retroactively imposed liability for inadequately funded or terminated private pension plans. Trustees have satisfied the *Goosby* standard of constitutional substantiality for the purpose of convening a three-judge court.

REVERSED and REMANDED with directions to the district court to convene a three-judge court.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 14, 1980

Wayne Jett, Esquire
3055 Wilshire Blvd., Suite 420
Los Angeles, California 90010

RE: John L. Connolly, et al. v. United States District Court for the Central District of California (Pension Benefit Guaranty Corporation, real party in interest)
No. 79-1246

Dear Sir:

The Court today entered the following order in the above-entitled case:

"The motion for leave to file a petition for a writ of mandamus is denied."

Very truly yours,
MICHEL RODAK, JR., Clerk
By Francis J. Lorson
Deputy Clerk

cc: Thomas E. Stanton, Jr., Esq.
Henry Rose, Esquire

United States Court of Appeals
for the Ninth Circuit

No. 79-7580

D.C. CV75-2037 DWW
CENTRAL CALIFORNIA

JOHN L. CONNOLLY, C. V. HOLDER,
HOWARD C. DENNIS, JOHN C. MAXWELL,
JAMES J. KIRST, et al.,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

PENSION BENEFIT GUARANTY CORPORATION, a
non-profit corporation, etc.,

Real Parties.

ORDER

Before: GOODWIN and FARRIS, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

Mo Cal 1/7/80

United States District Court
Central District of California

No. CV 75-2037DWW

JOHN L. CONNOLLY, et al., etc.
Plaintiffs,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

[Filed Sept. 13, 1979]

ORDER RE
THREE-JUDGE COURT

Plaintiffs, trustees of the Operating Engineers Pension Trust, move for convocation of a three-judge court to hear its constitutional claim that regulations of the Pension Benefit Guaranty Corporation infringe upon their right to contact and deprive them of property without due process. The case, filed in 1975, predates Public Law 94-381, 90 Stat. 1119, which amended the provisions for a prejudge court. However, Section 7 of that enactment specifically makes that Act not applicable to actions commenced before the enactment. The case is before this court on remand from the Court of Appeals, which has reversed this court's ruling based upon its construction of the statute. This court had agreed with the Trustees that their pension plan was excluded from the scope of the regulations complained of which plaintiffs complain.

Trustees assert that because they must make certain additional payments under ERISA beyond their contractual provision, that their right to contract has been infringed, and that there is a due process violation. This court considers the question, and has determined that as a matter of law there is no substantial constitutional

question raised warranting the convening of a three-judge court. The Court of Appeals made clear in its order of reversal and remand that the pension plan at issue fell under the provisions of ERISA. As a qualified pension plan under ERISA, the plan is a beneficiary of the tax benefits provided by the law, as well as being required to conform to the complained-of regulations issued by the agency entrusted with administration of provisions of ERISA. The Supreme Court has made clear that in claims of infringement of the constitutional right to contract and of a deprivation of property without due process, a party must accept the responsibilities imposed by a governmental scheme as part of its distribution of benefits, absent other due process violations. *Fahey v. Mallonee*, 332 U.S. 245 (1947). There is no allegation that the regulations about which plaintiffs complain were adopted in a manner contrary to due process or other rule-making requirements.

This Court may decline to certify the need to convene a three-judge court when the constitutional question presented is insubstantial. I therefore decline to do so.

IT IS SO ORDERED.

DATED: This 13th day of September, 1979.

DAVID W. WILLIAMS,
United States District Court

United States Court of Appeals
for the Ninth Circuit

No. 76-2777

JOHN L. CONNOLLY, et al.,
etc.
Appellees,

vs.

PENSION BENEFIT GUARANTY
CORPORATION, etc.
Appellant.

On Appeal from the United States District Court for
the Central District of California

[Filed May 4, 1978]

OPINION

Before ELY and MERRILL, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

This is an appeal by the Pension Benefit Guaranty Corporation (hereinafter referred to as PBGC) from a summary judgment entered in favor of the Board of Trustees of the Operating Engineers Pension Trust (Trustees) which exempted the Operating Engineers Pension Plan (Plan) from coverage under the insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 USC 1001 et seq. (ERISA or Act).

Federal jurisdiction over this action exists pursuant to 29 USC 1303(f).

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*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

On December 1, 1974, the Trustees paid a termination insurance premium of $12,043.00 to the PBGC. On April 10, 1975, the Trustees applied to the PBGC for a determination that the Plan was a defined contribution plan exempt from coverage under the insurance provisions contained in Title IV of the Act, 29 USC 1301 et seq. The PBGC informed the Trustees that the Plan was a defined benefit plan subject to the plan termination insurance coverage. Thereafter, the Trustees made a demand for return of their termination insurance premium, which was refused by PBGC.

On June 17, 1975, the Trustees filed a complaint in the district court for a declaratory judgment, damages and injunctive relief against the PBGC, challenging its determination that the Plan was a defined benefit plan subject to insurance coverage. Upon cross motions for summary judgment, the district court granted summary judgment in favor of the Trustees. *Connolly* v. *Pension Benefit Guaranty Corp.*, 419 F. Supp. 737 (C.D. Calif. 1976). In its order the district court declared the Plan to be a defined contribution plan exempt from insurance coverage under the Act, enjoined the PBGC from acting inconsistently therewith, and required the PBGC to return the Trustees' premium payment. *Connolly* v. *PBGC, supra* at 741-42. This appeal followed.

Initially it should be noted that the determination of the PBGC herein is entitled to great deference in the construction and application of ERISA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *General Electric* v. *Gilbert*, 429 U.S. 125, 141-42 (1976), quoting from *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1940), the Supreme Court stated:

> " 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of

their authority do consitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

The Operating Engineers Pension Trust is a joint labor-management trust established in conformance with § 302(c)(5) of the Labor Management Relations Act of 1947, as amended in 1959, 29 USC 186(c)(5). This trust was created in 1960 by agreement between eleven home builders associations and the International Union of Operating Engineers. The trust agreement created the multiemployer pension plan at issue here. The Plan is a tax qualified employee pension plan within the meaning of § 4021(a)(2) of ERISA, 29 USC 1321(a)(2). It is administered by a fourteen-member Board of Trustees appointed in equal part by the employers and the union. The individual plaintiffs are the trustees of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which their employees may draw benefits when they reach a stated age of retirement.

Under the pension trust, the employers periodically enter into collective bargaining agreements to establish the amount of their conribution to the Plan. In fulfillment of their obligation under those agreements, the employers contribute a certain amount of money to the Plan each month. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement.

The monthly amount of the pension payable to an eligible participant is determined by multiplying the Pension Factor in the Plan by the employee's Pension Credits and Prior Service Credits. The Pension Factor is an actuarial tool, calculated to translate plan experience into retirement benefits. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and any variance between actual and anticipated employer contributions and delinquencies. The Pension Factor is periodically revised by the Trustees.

The Pension Credit is a service-related formula determined in part by the amount of time spent on the job by the participant. The Plan also provides for some participants to be entitled to Prior Service Credits, for time spent on the job prior to the execution of this trust and Plan. Pension Credits are earned even if the employer fails to contibute the full amount of his obligation. The employee receives the appropriate pension benefit, as calculated by the above described formula, even though sufficient contributions have not been made on his behalf by his employer to the Plan.

By the express terms of the Plan, the employer's sole obligation to the pension fund is to pay such contributions as required by the collective bargaining agreements. The trust agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the fund. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.

ERISA is the product of several years of legislative effort to improve the American pension system. ERISA is a complex piece of legislation which addresses itself to many problems. One of the foremost concerns of Congress

in enacting the Act was to assure workers that retirement benefits would be available when needed. 29 USC 1001(a), (c) provides:

> "The Congress finds that . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to requisite funds to pay promised benefits may be endangered; that owing to the termination of plans before adequate funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .
>
> "It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to . . . meet minimum standards of funding, and by requiring plan termination insurance."

Consistent with ERISA's remedial function, Congress sought to effectuate the purpose of the Act as far as possible. In a report accompanying an earlier version of the bill, the Senate Committee on Labor and Public Welfare stated:

> "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973).

The issue before the Court is whether the Plan is a defined benefit plan under 29 USC 1002(35) or an individual account or defined contribution plan under 29 USC 1002(34). If the Plan is a defined benefit plan, it is covered by the termination insurance provisions of the

Act. If it is an individual account or defined contribution plan it is not covered by the termination insurance provisions, 29 USC 1321(b)(1), unless the Plan is a "plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." 29 USC 1321(c)(1). By definition, any plan that is not an individual account or defined contribution plan, must necessarily be a defined benefit plan. 29 USC 1002(35).

The district court ruled that the Plan is a defined contribution plan, not subject to termination insurance coverage under ERISA. This determination is erroneous.

In its decision the district court looked at the obligation which the employers participating in the Plan have contractually agreed to assume. Because the employers have agreed only to make specified contributions, and have disclaimed any obligation to pay any pension benefit, the district court held that the plan was a defined contribution plan under which no fixed benefit is promised. The district court reached its conclusion by considering that to subject the Plan to ERISA's termination insurance provisions would force upon the employer a greater obligation and liability than he had originally agreed to in his contract. *Connolly* v. *PBGC,* 419 F. Supp at 740.

However, this is precisely what the termination insurance provisions of the Act were intended to do. Whenever the PBGC pays pension benefits to participants of defined benefit plans which have terminated with insufficient assets to pay the benefits promised, (29 USC 1322), the PBGC is entitled to recover the amount of such benefits from the employers who maintained the terminated pension plan, up to an amount not exceeding thirty percent of the net worth of each employer involved. 29 USC 1362-1368. The precise intent of these sections was to impose

substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan.

29 USC 21321(b) provides that termination insurance coverage does not extend to any plan,

> "(1) which is an individual account plan, as defined in paragraph (34) of section 1002 of this title . . ."

29 USC 1002(34) provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The statutory definition of an individual account or defined contribution plan contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan. The Plan does not provide for an individual account for each participant. Contributions on behalf of participants are pooled in a general fund. While a record of contributions received on behalf of a participant is maintained by the Trustees, the participant has no right, title, or interest in these amounts. Under the structure of the Plan, no purpose is served in providing an individual account for each participant. The amount of a participant's benefit at retirement is not based on the amount of contributions paid on his behalf into an account. Rather the benefit is determined by a service related formula, Pension Credits plus Prior Service Credits multiplied by the Pension Factor. The

participant is entitled to receive that amount even though a sufficient amount of contributions has not been made on the participant's behalf.

The legislative history of ERISA clearly demonstrates that the primary purpose for termination insurance is to insure the payment of benefits in the event a plan terminates before it is fully funded. Legislative History of the Employee Retirement Income Security Act of 1974, at 213, 1830-31, 1865-72, 2361, 3371, 3373, 4802 (1976) (hereinafter cited as *Legis. Hist.*)

> "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans."

Legis. Hist. at 1094.

In the case of a true individual account plan, there is no possibility that the plan would terminate while being underfunded. Under such a plan, a separate account is kept for each covered employee, and the employee's accrued benefit at all times is simply "the balance of the individual's account." 29 USC 1002(23)(b). Thus by definition, an individual account plan can never be underfunded. Consequently, the funding provisions of ERISA, subject to certain exceptions, do not apply to such a plan. 29 USC 1081(a)(8). Individual account plans are excluded from ERISA's funding rules because these plans do not specify any benefit beyond the balance of each individual's account at the time it is disbursed.

For a similar reason, an individual account plan is also excluded from termination insurance coverage. 29 USC 1321(b)(1). Congress concluded that in the case of a true individual account plan there was no need for termination insurance, just as there was no need for rules as to

the funding of such an account. Since the participant is merely entitled to benefits determined by his own account, there is no unfunded amount to insure. *Legis. Hist.* at 1149.

Defined benefit plans, on the other hand, are subject to being underfunded for a variety of reasons because the benefits are not defined as the eventual balance in the individual's account. A defined benefit plan may provide benefits for service prior to the inception of the plan. In such a case, these prior service benefits need not be funded immediately, but may be amortized over thirty or forty years. 29 USC 1082(b)(B). As stated earlier, the Plan at issue provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits.

A funding deficiency in the Plan may also occur when the Trustees, through the use of the Pension Factor, establish pension benefits in excess of the amount of contributions received during the term of the collective bargaining agreement. Under the type of plan involved herein, if actuarial assumptions and calculations used in establishing the Pension Factor are correct as of the beginning of the term of the collective bargaining agreement, and the agreed upon employer contributions are adequate and paid when required, there would be no funding deficiency by reason of miscalculation during the term of the collective bargaining agreement. However, when anticipated contributions, relied upon in establishing benefits, exceed actual contributions unfunded liability may occur.

The risk of termination of a multiemployer Taft-Hartley pension plan, such as the plan before the Court, is significantly less than in a single employer plan, because of its larger economic base. Indeed, an effort was made to

exempt multiemployer plans from funding and/or termination insurance because of their relatively remote likelihood of termination. However, these proposals for outright exemption of multiemployer plans were rejected. Collectively bargained mulitemployer plans were not exempted from the requirement that unfunded past service liability be amortized. Rather, such plans were granted an additional ten years beyond the standard thirty-year period within which to amortize the unfunded past service liability. 29 USC 1982(b)(2)(B).

> "This recognizes that multiemployer plans generally have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties."

Legis. Hist. at 3317.

Recognition of the financial strength of a multiemployer plan is also contained in ERISA's insurance program. With respect to termination insurance, the statutory multiemployer plan premiums were established at one-half the rate for single employer plans. 29 USC 1306(a)(3)(B). The multiemployer plan's lower risk of termination was apparently sufficient to justify a different premium rate; however, it was not sufficient to warrant total exemption from termination insurance coverage.

> "In view of the relatively minor incidence of multiemployer plan terminations the conferees determined to delay mandatory coverage of multiemployer plan terminations until January 1, 1978, but to commence premium payments by such plan as of date of enactment to build up reserves in the event the Pension Benefit Guaranty Corporation extends discretionary coverage prior to that date. It is to be expected that this discretionary coverage will be

> extended fully to protect employees benefits in multiemployer plans.
>
> "The conferees had no intention whatsoever of treating workers in these plans as 'second-class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."

Legis. Hist. at 4767.

The district court also held that 29 USC 1321(c)(1) was applicable to the Plan. 29 USC 1321(c)(1) provides:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

The district court reasoned that the independent fiduciary duties of the Trustees necessarily precluded any characterization of the Trustees as employer representatives participating in the determination of pension benefits. *Connolly v. PBGC,* supra at 741.

In light of this Court's determination that the plan is not an individual account plan, and thus not exempt from termination insurance under 29 USC 1321(b)(1), we do not reach the issue of whether 29 USC 1321(c)(1) is applicable to the case at bar.

The district court's decision to proceed with the statutory construction issue without convening a three-judge court was permissible. See *Hagans v. Lavine,* 415 U. S. 528, 543-44 (1974).

The constitutional issues sought to be raised by the plaintiffs were not reached in the district court, and thus not properly before this Court. At this time, the Court makes no ruling with respect to any constitutional issues

which the parties may wish to present on remand. Generally, a reviewing Court should remand a case to the district court for consideration of a question not previously considered there. *Boire v. Miami Herald Publishing Co.,* 343 F. 2d 17, 25, (5th Cir.) *cert. denied* 382 U. S. 824 (1965). This Court holds only that: the Plan involved herein is not an individual account plan as defined by 29 USC 1002(34) and thus not exempt from the termination insurance program under 29 USC 1321(b)(1); and that the employer's disclaimer of liability for the payment of benefits does not convert the Plan into an individual account plan.

Accordingly, this case is Reversed and Remanded.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
No. CV 75-2037-DWW

John L. Connolly, C. V. Holder, Howard C. Dennis, John C. Maxwell, James J. Kirst, C. William Burke, Kenneth J. Bourguignon, Joseph H. Seymour, Richard L. Corbit, Harold Edwards, Donald E. Mier, William C. Waggoner, Richard Gannon and Alfred Harrison, each in his respective capacity as Trustee of the Operating Engineers Pension Trust,
Plaintiffs,

vs.

Pension Benefit Guaranty Corporation, a non-profit corporation established within the Department of Labor of the United States of America,
Defendant.

[Filed Feb. 12, 1976]

ORDER GRANTING SUMMARY JUDGMENT

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with § 320(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 USC § 186(c)(5). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the International Union of Operating Engineers, Local Union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to

administer the Pension Fund and to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 20% of the net worth of the employer's business, 29 USC 1362(a) and (b). Not all

types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan (1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1), of the Act provides as follows:

> "For purposes of subsection (b)(1), the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions

just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiff contends that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 USC § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendants legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be a formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and

to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Fund, except to the extent that he or it may be an Individual Employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may be hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the

benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the

Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually

to have prepared an actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustee and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by

Section 1002(34). That section defines an individual account plan as a plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retirement benefit is based on past service. The parties stipulate that a participant is entitled to a

pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 USC § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term "individual account plan" does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining agreement. The trustees are the ones who make a determination of the benefits, and this scheme includes no such participation on the part of the

employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 USC § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

DAVID W. WILLIAMS,
United States District Judge